Race, Culture & Religion:
A Review of Recent Judicial Decision and Commentary
Stetson Annual Conference 2003

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I. Race, Color, and National Origin

A. Amendments to United States Constitution

First Amendment (Ratified December 15, 1791)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment (Ratified Dec. 6, 1865)

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. Statutes

Title VI of the Civil Rights Act of 1964: No person in the United States shall, on the ground of race, color, or national origin, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

NONDISCRIMINATION UNDER PROGRAMS RECEIVING FEDERAL ASSISTANCE THROUGH THE DEPARTMENT OF EDUCATION EFFECTUATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

The purpose of this part is to effectuate the provisions of Title VI of the Civil Rights Act of 1964 (hereafter referred to as the "Act") to the end
that no person in the United States shall; on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Education (Sec. 601, civil Rights Act of 1964, 78 Stat. 252; 42 U.S.C. 2000d)

Application of this regulation
This regulation applies to any program for which Federal financial assistance is authorized to be extended to a recipient under a law administered by the Department, including the Federal Assisted programs and activities listed in Appendix of this regulation. It applies to money paid, property transferred, or other Federal financial assistance extended after the effective date of the regulation pursuant to an application approved prior to such effective date. This regulation does not apply to (a) any Federal financial assistance by way of insurance or guaranty contracts, (b) money paid, property transferred, or other assistance extended before the effective date of this regulation, (c) the use of any assistance by any individual who is the ultimate beneficiary under any such program, or (d) any employment practice, under any such program, or any employer, employment agency, or labor organization, except to the extend described in 100.3. The fact that a type of Federal assistance is not listed in Appendix A shall not mean, if Title VI of the Act is otherwise applicable, that a program is not covered. Federal Financial assistance under statutes now in force or hereinafter enacted may be added to this list by notice published in the Federal Register (§602, §604, Civil Rights Act of 1964; 78 Stat. 252, 253; 42 U.S.C. 2000d-1, 2000d-3)

Discrimination prohibited.
A. General. No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this part applies.
B. Specific discriminatory actions prohibited. (1) A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on ground of race, color, or national origin;
C. Deny an individual any service, financial aid, or other benefit provided under the program;
D. Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;
E. Subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program;
F. Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;

G. Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program;

H. Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program (including the opportunity to participate in the program as an employee but only to the extent set forth in paragraph (c) of this section).

I. Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.

C. Administrative Actions:

Decision of Office of Civil Rights: Investigation of University of California at Berkeley Law School (Boalt Hall)

In 1978, Boalt Hall established an overall annual goal of admitting from 23-27% of each class from certain racial/ethnic groups that the law school determined should receive "special consideration" in the admissions process. The established goals for each special consideration group are 8-10% for blacks, 8-10% for Hispanics, 5-7% for Asians, and 1% for Native Americans. When establishing these percentages, the law school took into account general information on discrimination against racial and ethnic minority groups, representation of these groups in law school and in the legal professions, and their representation generally in the U.S. population.

The special considerations program is not designed to remedy findings of prior discrimination. The program is an effort to achieve educational diversity by increasing the representation in each class of "applicants who are members of cultural, ethnic or racial groups that have not had a fair opportunity to develop potential for academic achievement and would not otherwise be meaningfully represented," and to address the under representation in the legal profession of members of such groups.

The law school receives four to six thousand applications each year from which it admits 270 applicants. These applications are assigned an index score and placed into one of four admissions ranges (A-D) according to the index score. An applicant's race and national origin is noted on each file. The Director of Admissions reviews all applications and usually admits one-half of the entering class with the rest of the decisions made by an Admissions Committee. The Director considers the goals and if he finds a shortfall he adjusts the number of students he admits administratively and adjusts the instructions for the next batch of applicant files that are sent to the admissions committee.
The special consideration files are grouped by race or national origin. The files are then sent to the admissions committee, which is made up of seven teams. The teams are comprised of one student and one faculty member. Each team receives a batch of files, which includes the special consideration files as well as non-resident regular files and resident regular files. The Director provides instructions to the committee teams as to the number within each group to be admitted, denied admission or placed on the wait list. Applicants placed on the wait list are rank-ordered by the teams for placement on either a resident or a non-resident list. Regular and special consideration applicants are ranked separately. If the Director determines that Boalt Hall will fall short of its goal for admitting persons of a certain special consideration group, he can by-pass applicants on the wait list and pick the next available person who fits the profile of the desired special consideration group.

In 1990, more than 34% of the incoming class was made up of applicants from minority groups receiving special consideration. Boalt Hall met or exceeded its affirmative action goals for every subgroup. The law school also admitted a larger class than was anticipated. The school admitted 308 applicants instead of 270.

Title VI prohibits discrimination on the bases of race, color, and national origin. An affirmative action admissions program that gives consideration to race or national origin is permissible under Title VI and its implementing regulation, but such a program must operate within certain parameters. For example, under Section 100.3(b)(6)(i) of the regulation, recipients may consider race (or National origin) in its admissions program if such action was required to remedy a specific finding of discrimination by a court, legislative, or administrative body. Even without such a finding, a recipient could voluntarily "take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin." 34 CFR 100.3(b)(6)(ii). Justice Powell's opinion in University of California v. Bakke, 438 U.S. 265 (1978), concluded that certain rationales for an affirmative action plan were insufficient to justify the use of race or national origin in making admissions decisions. The opinion rejected, as justification for racial preferences, the desire to address societal discrimination, as well as the desire to address underrepresentation of minorities in the medical professions. Justice Powell recognized that race or ethnicity may be considered in the context of a university's interest in establishing a diverse student body that represents many different experiences, opinions, backgrounds, and cultures. Consistent with this opinion, in establishing a voluntary affirmative action plan, a recipient cannot foreclose consideration of individuals on the basis of race or national origin, or otherwise use race or national origin as an exclusionary criterion. An applicant's race or ethnicity may be deemed a plus within the context of an effort to achieve educational diversity, but cannot "insulate the individual from comparison with all other candidates for available seats." Bakke at 317.

OCR has concluded that some of Boalt Hall's admissions procedures are not consistent with Title VI requirements. Admissions decisions of the committee teams are made with no comparison between applicant batches or categories within those batches. Applicants referred to the Admissions Committee did not compete for all of the remaining seats, but rather only for whatever percentage remains unfilled for his or her
particular racial or ethnic group. Also, admissions practices with respect to placing
students on wait lists and selecting wait-listed students for admission circumscribed
competition based on race and ethnicity. Wait list tier placement did generally.
Selections from wait lists were handled in a manner designed to ensure specific results
along racial or ethnic lines.

In practice, Boalt Hall administered its program of special consideration in a manner
designed to ensure that the affirmative action percentage goals would be met. In
effect, the admissions process allowed the affirmative action percentages to control the
decision-making as necessary to gain the desired result of a particular racial-ethnic mix in
the school’s population. The manner in which race and ethnicity were considered had
the effect of circumscribing competition and effectively excluding applicants from
consideration for available positions based on their race or ethnicity. This approach to
achieving educational diversity is inconsistent with Title VI.

Educational diversity is a legitimate goal for a university; however, such diversity must
include more than assuring that the student body is comprised of students from
particular racial or ethnic backgrounds. Boalt Hall maintains that its entering classes
reflect various elements of diversity such as age, gender, geographic origin,
postgraduate experience, work experience, extracurricular activities, and economic
disadvantage. However, under the law school’s admissions procedures, some of these
considerations, such as age, gender and geographic origin, are specifically not permitted
to enter into admissions decisions. In additions, none of the factors, other than
percentage of students admitted from out of state, are monitored as part of the
admissions process. Nevertheless, Boalt Hall maintains that is seeks more than racial or
ethnic diversity, but that it can accomplish educational diversity without giving other
factors similar attention to that given race and ethnicity.

The manner in which Boalt Hall has considered race and ethnicity in admissions is not
consistent with Title VI requirements. Race and ethnicity may be considered as plus
factors in the admissions process where such characteristics are considered important
by the University to achieving educational diversity. The pursuit of educational diversity
cannot serve as a justification for handling admissions decisions in a manner that
insulates applicants, based on their race or ethnicity, from competing with other
applicants. Title VI allows affirmative consideration of race or ethnicity, but for such
consideration to be justified as a part of an effort to achieve genuine educational
diversity, other aspects of diversity must be afforded similar consideration, though not
necessarily identical weight. As administered, Boalt Hall’s affirmative consideration of
race and ethnicity had the effect of isolating one aspect of educational diversity from all
others, and in so doing, failed to ensure that all applicants would be afforded fair
consideration with respect to potential diversity contributions. This approach failed to
ensure that applicants would be free from discrimination on the basis of race, color, or
national origin.

Under Bakke, justifications, other than educational diversity, presented by Boalt Hall for
its affirmative consideration of race and ethnicity were not sufficient to support the
consideration of race and ethnicity in its admissions process.
Because Boalt Hall's practices in considering race and ethnicity of applicants are not consistent with Title VI requirements, OCR has determined that adjustments would be needed in order to bring the University into compliance with applicable law. OCR has discussed its findings and Title VI compliance concerns with University officials, and the University has agreed to take steps to address OCR's concerns.

Boalt Hall agreed that it would administer its admissions process in a manner consistent with its obligation under Title VI of the Civil Rights Act of 1964 and that subsequent to the date of this Agreement:

1. Admissions decisions will not be based solely on the race, color or national origin of applicants.
2. Applicants will not be considered separately for admission or admitted separately based on their race, color, or national origin.
3. Applicants will not be excluded from consideration for available spaces in the program based on race, color, or national origin. Space for admission into the law school program will not be set aside based on race, color, or national origin.
4. If achieving a diverse student population is determined to be an educational objective that will affect admissions decisions, diversity considerations will not be limited to race, color, or national origin, but will include a variety of diversity factors deemed important to establishing a diverse educational environment.
5. If Boalt Hall adopts numerical or percentage equal educational opportunity participation goals that reference race, color, or national origin, such goals will not be applied in the admissions process in a way designed to ensure the result with respect to the particular number or percentage distribution of students based on race, color, or national origin.

This Agreement did not prohibit affirmative consideration of race, color, or national origin for remedial purposes in response to a finding of discrimination by an authority empowered to make such a finding. Also, special recruiting efforts to encourage a broad pool of minority applicants are not prohibited by this agreement.

D. Cases

*Regents of the University of California v Bakke*, 438 US 265 (1978)

The University of California at Davis Medical School admitted only 100 students each year. Sixteen of the one hundred admits were set aside for "disadvantaged" applicants. The Medical School had two admissions programs, a regular program and a special program. Under the regular program, an applicant whose grade point average (GPA) was below 2.5 out of 4.0 was rejected. Under the special program, if an applicant was from a minority group and was found to be "disadvantaged" then they were exempted from the 2.5 GPA minimum and their applications were sent to a special committee composed of members of the minority community. The special admits were given one of the sixteen set aside slots. No disadvantaged white students were admitted under the special program.
Allan Bakke, a white male, applied for admission to the Medical School in both 1973 and 1974. Both times his application was rejected. Bakke brought suit in a California Superior Court to force his admission stating that the special admission's program excluded him from being admitted to the medical school on the basis of his race in violation of the Equal Protection Clause of the Fourteenth Amendment, the California Constitution and Title VI of the 1964 Civil Rights Act.

The trial court found that the special program operated as a racial quota because minority applicants in the special program were rated only against one another. The Court found the University in violation of the 14th Amendment, the California State Constitution and Title VI. However, the Court did not order Bakke to be admitted.

Bakke then appealed to the California Supreme Court only that portion of the decision which denied him admission. This court ruled that since Bakke had met the burden of proof establishing that he had been discriminated against, then the University had to demonstrate that Bakke would not have been admitted even if there were no special program. To do this the California Supreme Court moved to have this matter remanded to the trial court. The University, however, in its petition for a rehearing conceded that it was unable to carry that burden. They then appealed to the U.S. Supreme Court.

Below is an excerpt from the U.S. Supreme Court Opinion, *Regents of the University of California v Bakke*:

Justice Powell announced the judgement of the court and delivered an opinion expressing the view that (1) it was not necessary to determine whether a private right of action existed under Title VI of the Civil Rights Act, since the question had not been considered in the courts below; (2) Title VI proscribed only those racial classifications that would violate the equal protection clause or the Fifth Amendment; (3) for purposes of the equal protection clause, racial and ethnic distinctions of any sort were inherently suspect and thus called for the most exacting judicial examination, racial and ethnic classifications being subject to stringent examination without regard to whether the group discriminated against was a discrete and insular minority; (4) when a burdensome classification (including a preferential classification to remedy past discrimination) touched upon an individual’s race or ethnic background, he was entitled to a judicial determination that the burden he was asked to bear on that basis was precisely tailored to serve a compelling governmental interest; (5) since in the case at bar there was no determination by the legislature or a responsible administrative agency that the University had engaged in a discriminatory practice requiring remedial efforts, and since the special admissions program totally foreclosed some individuals from enjoying the state-provided benefit of admission to the medical school solely because of their race, the classification must e regarded as suspect, and thus was permissible only if supported by a substantial state purpose or interest, and only if the classification was necessary to the accomplishment of such purpose or the safeguarding of such interest; (6) the special
admissions program could not be justified as serving the purposes of (a) assuring within the student body a specified percentage of a particular racial group, since such racial preference was facially invalid as discrimination for its own sake, (b) countering the effects of "societal discrimination," since the government has a substantial interest in correcting the effects of specific, identified discrimination only, (c) increasing the number of physicians who would practice in communities currently underserved, there being virtually no evidence that the special admissions program was either needed or geared to promote such goal, or (d) obtaining the educational benefits that flowed from an ethnically diverse student body, since even though such a diversity was a constitutionally permissible goal in view of the First Amendment's special concern for academic freedom, nevertheless the defendant's program—reserving a fixed number of seats in each class solely on the basis of race, whereas the admissions programs of other universities properly took race into account as only one of the factors for consideration in achieving educational diversity through programs involving individual, competitive comparison of all applicants—was not necessary to promote the interest of diversity; and (7) thus, the defendant's special admissions program violated the Fourteenth Amendment, the California Supreme Court's judgment being proper as to its invalidation of the program and its ordering the admission of the plaintiff, but being improper insofar as it enjoined the defendant from ever giving any consideration to race in its admissions process.

Justice Powell also cites the Harvard College program. He quotes from the Brief submitted by Columbia University, Harvard University, Stanford University and the University of Pennsylvania as Amici Curiae as follows:

In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students...

In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are 'admissible' and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer...

In Harvard College admissions the Committee has not set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year...But that awareness [of the necessity of including more than a token number of black students] does
not mean that the Committee sets a minimum number of blacks or of people from west of the Mississippi who are to be admitted. It means only that in choosing among thousands of applicants who are not only 'admissible' academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many types and categories of students.

*Bakke*, 438 US at 316-17

The Harvard Admission Program that Justice Powell quotes states that

The number of applicants who are deeded to be not qualified is comparatively small. The vast majority of applicants demonstrate through test scores, high school records and teachers' recommendations that they have the academic ability to do adequate work at Harvard, and perhaps to do it with distinction.

*Bakke*, Appendix to Justice Powell's opinion 38 US at 321.

The following two charts, found in footnotes in Judge Powell's opinion are helpful in understanding the Court's reasoning. The first chart, footnote 6, shows a comparison of minority admissions from 1970 to 1974 between the Special Admissions Program and the regular admissions program.

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<tr>
<th>Year</th>
<th>Special Admissions Program</th>
<th>General Admissions</th>
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<tbody>
<tr>
<td></td>
<td>Blacks</td>
<td>Chicanos</td>
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<tr>
<td>1970</td>
<td>5</td>
<td>3</td>
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<td>1971</td>
<td>4</td>
<td>9</td>
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<td>1972</td>
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<td>1973</td>
<td>6</td>
<td>8</td>
</tr>
<tr>
<td>1974</td>
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Id., at 216-218. Sixteen persons were admitted under the special program in 1974, ibid., but one Asian withdrew before the start of classes, and the vacancy was filled by a candidate from the general admissions waiting list. Brief for Petitioner 4 n. 5.

*Bakke*, 57 L.Ed. 2d at 762
The second chart, found in footnote 7, compares Allan Bakke's test scores to those who were admitted under the regular admissions process and the special admissions process.

7. The following table compares Bakke’s science grade point average, overall grade point average, and MCAT scores with the average scores of regular admittees and of special admittees in both 1973 and 1974. Record 210, 223, 231, 234:

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<tr>
<td>Bakke</td>
<td>3.44</td>
<td>3.46</td>
<td>96</td>
<td>94</td>
<td>97</td>
<td>72</td>
</tr>
<tr>
<td>Average of regular admittees</td>
<td>3.51</td>
<td>3.49</td>
<td>81</td>
<td>76</td>
<td>83</td>
<td>69</td>
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<tr>
<td>Average of special admittees</td>
<td>2.62</td>
<td>2.88</td>
<td>46</td>
<td>24</td>
<td>35</td>
<td>33</td>
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<td>3.46</td>
<td>96</td>
<td>94</td>
<td>97</td>
<td>72</td>
</tr>
<tr>
<td>Average of regular admittees</td>
<td>3.36</td>
<td>3.29</td>
<td>69</td>
<td>67</td>
<td>82</td>
<td>72</td>
</tr>
<tr>
<td>Average of special admittees</td>
<td>2.42</td>
<td>2.62</td>
<td>34</td>
<td>30</td>
<td>37</td>
<td>18</td>
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Bakke, 57 L. Ed 2d at 763


A race-based scholarship program established by the University of Maryland to attract African-American students is unconstitutional, the U.S. Court of Appeals for the Fourth Circuit ruled October 27, 1994. The program isn’t narrowly tailored to remedy present effects of past discrimination, the court said.

The university offered a slate of present effects to justify the scholarship program: the university’s poor reputation in the black community, the perception that the campus is hostile to blacks, underrepresentation of blacks in the student population, and low retention and graduation rates of black students.

In consideration the first two effects, the court noted tat the past practice of de jure segregation at the university is widely known. Knowledge of these historical circumstances, however, is not a present effect of the type that would justify a race-based remedy, it said. Societal discrimination is distinct from effects that implicate race-based discrimination on the university's part. Only the latter can support a race-conscious remedy, the court said.

The court found more likelihood that underrepresentation and high attrition rates for black students were related to past discrimination. But it said the scholarship program is not narrowly tailored to remedy these problems. The scholarships are used to attract high-achieving black students to the campus, but high achievers are not the group that suffered from the university’s past discrimination. In addition, the university made no showing that it tried race-neutral solutions to these problems.
Essentially, a quota mentality underlies the scholarship program, the court said. Black students will be awarded scholarships until their representation on campus corresponds to some percentage of Maryland's black high school graduates who might take part in higher education. The program is therefore closer to a racial balancing program than to a program narrowly tailored to remedy past discrimination, the court said.

*Hopwood v. Texas*, 78 F.3d 932 (1996)

The plaintiffs, 4 white students who were denied admission to The University of Texas School of Law, alleged that the Law School administered a racially discriminatory admissions program that violated the 14th Amendment and other constitutional and statutory provisions. The 1992 admissions process in question used different cut-off scores and separate reviews in its admission of minority (specifically, Blacks and Mexican-Americans), and non-minority applicants.

Applicant files were reviewed by subcommittees of the admissions committee, with a separate subcommittee reviewing the files of minority applicants. The school also used different standards, based on a combination of college grades and LSAT scores, for assigning minority and non-minority applicants to "presumptive denial" and "presumptive admission" categories. The Law School was attempting to meet the "aspirational" target, subject to the quality of the applicant pool, of 10% Mexican-American and 5% Black students.

In 1994, the Law School abandoned the above policy for one that treated race as simply one factor of several in the individualized consideration and comparison of its applicants.

The District Court issued on opinion on August 19, 1994 (861 F.Supp 551). The Court ruled that while the law school had the right to take race into account it also ruled that the admissions program violated the 14th Amendment because it had a separate review of minority applicants and was not narrowly tailored. This did not assure "comparative evaluation among all applicants. The District Court further ruled that "the applicants in determining which were best qualified... including appropriate consideration of [race as] a 'plus' factor created a procedure in which the admission of the best qualified was not assured." The Judge did not admit the plaintiffs into the Law School as he decided that they did not show that they would have been admitted under a plan that was constitutional. However, he did say that they could reapply without having to incur additional administrative costs. The District Court only awarded each plaintiff one dollar in damages and no attorneys fees.

Illegal quotas are set aside or unyielding number set to achieve a goal. However, the court found that "the law school did not rigidly and inflexibly apply the numbers" (at 574). The Court noted that the law school maintained a separate wait list, one for minorities and one for non-minorities, this was not discriminatory as in *Bakke* as there was no evidence at trial in which the applicants race was the deciding factor (footnote 68 at 574)
the Texas School of Law may not use race as a factor in deciding which applicants to admit in order to achieve a diverse student body, to combat the perceived effects of a hostile environment at the law school, to alleviate the law school's poor reputation in the minority community, or to eliminate any present effects of past discrimination by actors other than the law school. Because the law school has proffered these justifications for its use of race in admissions, the plaintiffs have satisfied their burden of showing that they were scrutinized under an unconstitutional admissions system. The plaintiffs are entitled to reapply under an admissions system that invokes none of these serious constitutional infirmities.

The Court also ruled that the District Court must reconsider the question of damages.

While this decision is only valid in the Fifth Circuit (the states of Texas, Louisiana and Mississippi) it has nationwide implications as the Podberesky decision on race-based scholarships did in the Fourth Circuit (cert. was denied by the Supreme Court). The Fifth Circuit decision, for all practical purposes, overrules the 1978 U.S. Supreme Court decision in Regents of the University of California v. Bakke. In Bakke the Supreme Court ruled that it was permissible to consider race when making admissions decisions.

Gratz et al v Bollinger et al,

Jennifer Gratz is a white female. Patrick Hamacher is a white male. Both applied to the University of Michigan's College of Literature, Science and the Arts (LSA). Gratz applied in 1995 and Hamacher in 1997. Both applicants were rejected. Gratz and Hamacher filed a class action lawsuit against the University of Michigan's Literature, Science and Arts Program in the U.S. District Court for the Eastern District of Michigan. In their complaint they allege that the LSA program was in violation of Title VI of the Civil Rights Act of 1964 as well as the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution in that the school considered race as a factor in their admitting process.

The University argued that it had a compelling interest in the educational benefit from a diverse student body. The University relied heavily on Justice Powell's opinion Bakke characterizing diversity as "constitutionally permissible objective" in the context of higher education.

The Court upheld the admissions system the University had in place. The District Court said that diversity constituted a compelling interest in the university context. It noted that its decision was in contrast with the Fifth Circuit's ruling in Hopwood v. Texas.

The District Court also differentiated between this case and Bakke. The Court noted that Michigan's admissions policy was narrowly tailored to achieve a compelling interest in having a diverse student body. In Bakke, non-minority medical school applicants did
not compete against favored minority applicants for a pre-determined number of openings. Michigan did not have a pre-determined set-aside. The University also did not have a separate minority review committee.

Grutter v Bollinger, 288 F.3d 732 (2002)

Barbara Grutter, a white female, applied for admission to the University of Michigan's Law School in 1996. She was initially put on the waiting list but in June of 1997, her application was rejected. She filed a class action lawsuit in the U.S. District Court for the Eastern District (Southern Division). Grutter alleged in her complaint that the law school discriminated against her and other similarly situated on the basis of her race in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, 42 USC §1981 and §1983, and Title VI of the Civil Rights Act of 1964 §2000d. The Law School responded to the complaint as follows:

Defendants admit that the University of Michigan Law School has a current intention to continue to use race as a factor in admissions, as part of a broad array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.

Plaintiffs argued that race was a "super factor in the admissions process."

The District Court found that the use of race in the Law School's admission's process was in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, and Title VI of the Civil Rights Act of 1964 and the Law School was enjoined from using race as a factor in its admissions process. The district court relied on five factors to determine that the admissions policy was not "narrowly tailored." The factors are:

(a) the Law School did not define "critical mass: with sufficient clarity;
(b) the apparent lack of a time limit on the Law School's consideration of race and ethnicity;
(c) the admissions policy was "practically indistinguishable" from a quota system;
(d) the Law School did not have a logical basis for considering the race and ethnicity of African-Americans, Native Americans and Puerto Ricans; and
(e) the Law School did not "investigate alternative means for increasing minority enrollment.

(Grutter, 137 F.Supp2d at 850-852)

The Sixth Circuit Court of Appeals, sitting en banc, heard oral arguments on December 6, 2001 and they issued their opinion on May 14, 2002. The Court reversed the District Court’s ruling that the admissions policy was unconstitutional. The Court held that the Law School’s diversity goal was a compelling state interest. The Court ruled that the Law School admission's policy was "narrowly tailored" to achieve that goal. Unlike the District Court, the Sixth Circuit found that the Law School used many factors in its admitting process and did not rely mainly on race and ethnicity. The Court did not
consider the Law School's admissions process as a quota system. In that vein, the Appeals Court dismissed the District's use of Adarand Constructors, Inc. v. Pena, 515 US 200 (1995) as controlling. In Adarand, the Supreme Court held that "racial classifications are illegal except to remedy past discrimination." Here the Appeals Court held that Bakke was controlling and that Adarand did not over-rule Bakke as Bakke is the only case that deals directly with admissions process.

As mentioned in Bakke, the court relied on a Harvard plan for admitting students in deciding that case. In Grutter, the Sixth Circuit also referenced the Harvard Plan. They do it to show that the District Court ignores both the Harvard Plan the Law School's admissions policy. The Harvard Plan specifically identified "blacks and Chicanos and other minority students" among the underrepresented groups that Harvard sought to enroll through its admission policy. (Grutter, 288 F.3d at 751 quoting Bakke, 438 U.S. at 322, 1978).

EXHIBIT A

University of Michigan Grid 1991

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11/21/91 revised
This is also a politically charged issue. President Bush has weighed in through his Solicitor General with a brief in support of the petitioners. A recent poll by the Los Angeles Times shows that Americans support his position. The following article from the Chronicle of Higher Education's daily update from Friday, February 7, 2003 provides details on the poll:

Poll Finds Wide Support for Bush’s Stance Against Michigan's Race-Conscious Admissions Policies

By PETER SCHMIDT

A majority of Americans approve of the Bush administration’s recent decision to oppose the University of Michigan's race-conscious admissions policies before the U.S. Supreme Court, according to a Los Angeles Times poll published on Thursday.

Most Americans feel that colleges should not consider the race or ethnicity of applicants, even though a solid majority also believes that the nation has not come close to eliminating discrimination against racial or ethnic minority groups, the newspaper’s poll found.

Even nonwhite Americans, as a whole, were more likely than not to support the Bush administration's decision, the newspaper reported.

The newspaper conducted the telephone poll by randomly contacting 1,385 Americans across the nation from January 30 through February 2. It places the margin of error for its entire sample at plus or minus 3 percentage points, and notes that, for certain subgroups, the margin may be somewhat higher.

The leaders of groups opposed to affirmative action cheered the poll’s results as affirming their belief that race-conscious admissions policies have little public support.

"This is what we have said for years. The American people do not support a system of preferences and quotas," said Diane M. Schachterle, a spokeswoman for the American Civil Rights Institute, based in Sacramento, Calif.

"Politicians who are afraid to speak out against racial preferences should read the polls. The unpopular position is supporting racial preferences, not opposing them," said Curt A. Levey, director of legal and public affairs for the Center for Individual Rights, which is providing legal representation to the rejected white applicants who are challenging Michigan's admissions
policies in the two cases before the Supreme Court (The Chronicle, January 24).

But supporters of affirmative action said that the Times poll and others like it misrepresent race-conscious admissions policies and pose questions with inflammatory language that skews the results.

"There is no way for a public-opinion poll such as this one to convey the nuances of college admissions," said Julie Peterson, a spokeswoman for the University of Michigan. "We think surveys such as this one greatly oversimplify the issues at hand."

Shirley J. Wilcher, executive director of Americans for a Fair Chance, objected to the poll's frequent use of the phrase "racial preferences," arguing that the use of such "loaded terms" in poll questions misrepresents the spirit of affirmative-action programs and assures "the kind of polarized, emotion-laden results that they have received."

"For these news outlets to continue to use the word 'preferences' is to continue to confuse the public and exacerbate racial divisions," Ms. Wilcher said. Her organization represents a coalition of civil-rights groups that support the sorts of race-conscious admissions policies in place at Michigan and other higher-education institutions.

The Times poll found that the respondents' views of affirmative action were closely tied to their race and self-reported political affiliations and beliefs. In dealing with race and ethnicity, however, the newspaper characterized poll respondents only as being either "whites" or "minorities," because, it said, its pool of respondents was not large enough to break out the results for those who were Asian, black, or Hispanic.

Fifty-five percent of all respondents approved, and 27 percent disapproved, of the Bush administration's decision to oppose the University of Michigan's use of racial preferences in admissions. (The remaining 18 percent answered "don't know.")

The group that approved of the Bush administration's decision included 59 percent of white respondents, 46 percent of minority respondents, 44 percent of Democrats, 77 percent of Republicans, 54 percent of independents, 43 percent of liberals, 53 percent of moderates, and 68 percent of conservatives.

The group that disapproved of the Bush administration's stance included 21 percent of white respondents, 41 percent of minority respondents, 39 percent of Democrats, 11 percent of Republicans, 29 percent of independents, 47 percent of liberals, 28 percent of moderates, and 15 percent of conservatives.
The respondents also were asked whether colleges should consider only the academic records of applicants, or should attempt to balance their student body by also taking race, ethnicity, gender, and geographic location into account. In all, 57 percent said colleges should look only at academic records, while 33 percent endorsed considering the other factors listed, and 10 percent answered "don't know."

Democrats were evenly split on the issue, with 46 percent favoring an exclusive focus on academic records, and 46 percent endorsing the consideration of the other traits listed. Liberals were split 50 percent to 46 percent, respectively, over the two approaches. Minority respondents supported the academics-only approach by a narrow enough margin to be within the poll's margin of error.

Every other subgroup supported academics-only admissions policies by lopsided margins. The poll found that 73 percent of Republicans, 65 percent of conservatives, and 62 percent of white respondents favored the academics-only approach.

In some respects, the choice posed by the question is a false one, since colleges consider many other factors -- such as applicants' athletic or musical ability, or relationship to alumni -- that are not clearly "academic," but those are not mentioned among the nonacademic criteria that could be considered.

"Determining the merit of an individual student is much more complex than just grades and test scores," said Ms. Peterson of the University of Michigan.

When asked how close the nation was to eliminating discrimination against racial and ethnic minorities, 58 percent of all respondents, and solid majorities of each subset, answered "not close."

Respondents also were asked how often affirmative-action programs designed to help women and minorities get better jobs and education ended up depriving someone else of their rights. Among all respondents, 6 percent answered "almost always," 28 percent said "quite a lot," 47 percent said "only occasionally," and 9 percent said "almost never." With the exception of Republicans, every subset of those polled was likeliest to answer either "only occasionally" or "almost never."

Affirmative-action programs that give preferences to people from socieconomically disadvantaged backgrounds, regardless of their gender or ethnicity, were strongly supported by every subset of respondents except Republicans (who favored such programs narrowly). In all, 60 percent of respondents favored, and 30 percent opposed, giving
preferences to the economically disadvantaged. (Copyright © 2003 by The Chronicle of Higher Education)

II. Culture, Diversity and Pluralism

A. Culture

The definition of "culture," according to The American Heritage Dictionary of The English Language, (4th Edition) is:

1a. The totality of socially transmitted behavior patterns arts, beliefs, institutions and all other products of human work and thought, b. These patterns, traits, and products considered as the expression of a particular period, class, community or population, d. The predominating attitudes and behavior that characterize the functioning of a group or organization.

B. Diversity

Other than a dictionary definition, diversity appears to be a relatively undefined term, even in the legal opinions which speak so extensively about diversity. It appears that each institution must define diversity for itself. For discussion purposes, we can start with the dictionary definition of diversity as the quality of being different, being made up of distinct characteristics, qualities, or elements.

Most commentators have explored the goals and benefits of diversity as a University value. In an April 19, 1996 article in the Chronicle of Higher Education entitled, "Why a Diverse Student Body Is So Important", Neil L. Rudenstine, then Harvard's President, wrote:

Few issues have aroused more debate in recent years than those surrounding diversity and university admissions. Out of the controversy, several proposals have emerged to eliminate factors such as race, ethnicity, and gender from consideration in the admissions process. The University of California system, at the direction of its Board of Regents, is scheduled to implement such changes soon. A few weeks ago, in Hopwood v. State of Texas, the U.S. Court of Appeals for the Fifth Circuit ruled that the University of Texas may not consider race as a factor in its law-school admissions, despite the university's assertion of a compelling interest in fostering student diversity.

In a debate so often framed in terms of the competing interests of different groups, it is all the more important that we continue to stress the most fundamental rationale for student diversity in higher education: its educational value. Students benefit in countless ways from the opportunity to live and learn among peers whose perspectives and experiences differ from their own.
A diverse educational environment challenges them to explore ideas and arguments at a deeper level -- to see issues from various sides, to rethink their own premises, to achieve the kind of understanding that comes only from testing their own hypotheses against those of people with other views. Such an environment also creates opportunities for people from different backgrounds, with different life experiences, to come to know one another as more than passing acquaintances, and to develop forms of tolerance and mutual respect on which the health of our civic life depends.

Some historical context can be helpful in our present situation. The deliberate, conscious effort to achieve greater student diversity on our campuses was not born in the 1960s, as some might believe. It did not originate with formal programs of affirmative action. It reaches back at least a century earlier, to a time when issues of racial, ethnic, and other forms of diversity were no less volatile in American life than they are today. I discussed some of this history in a recent report to Harvard's Board of Overseers. While the report focused largely on Harvard -- and while different institutions have taken various approaches -- some aspects of Harvard's experience highlight points of more general significance.

Diversity as an important concept in education was discussed as early as the mid-19th century. At Harvard, the coming of the Civil War prompted some of the earliest comments on the subject. On the eve of the war, Harvard President Cornelius C. Felton saw an urgent need for universities to reach out more consciously to students from different parts of the country. Gathering such students, he wrote, "must tend powerfully to remove prejudices, by bringing them into friendly relations."

Felton did not suggest that there was any link between geographical background and individual academic achievement or promise; his rationale was quite different. He understood that students from different parts of the nation, from different states and regions, possessed a variety of cultural, political, and social attitudes born of their own experiences. By bringing such students together in a residential community dedicated to learning, he reasoned, a university could not only offer a more challenging education, but also could help "to remove prejudices" and foster greater mutual understanding.

Only a few years earlier, Henry Adams had attended Harvard with classmates who were drawn largely from well-established New England families. But, as he later wrote, "chance insisted on enlarging [his] education by tossing a trio of Virginians" into the mix, including "Roony" Lee, son of Robert E. Lee. Adams, as he wrote of himself and the Virginians, "knew well how thin an edge of friendship separated them in 1856 from mortal enmity," but they managed a friendship that was "unbroken and even warm."
For the first time, Adams's education "brought him in contact with new types and taught him their values. He saw the New England type measure itself with another, and he was part of the process." Decades later, Adams still vividly remembered the "vital lesson" he had learned in first coming to know and to understand people whose outlooks were so different from his own.

After the Civil War, Charles W. Eliot, president of Harvard from 1869 to 1909, expanded the conception of diversity, which he saw as a defining feature of American democratic society. He wanted students from a variety of "nations, states, schools, families, sects, and conditions of life" at Harvard, so that they could experience "the wholesome influence that comes from observation of and contact with" people different from themselves. He wanted students who were children of the "rich and poor" and of the "educated and uneducated," students "from North and South, from East and West," students belonging to "every religious communion, from the Roman Catholic to the Jew and the Japanese Buddhist."

Although Eliot’s turn-of-the-century conception of "race" differed from our own -- particularly in its emphasis on characteristics that we might today associate more with ethnicity, national origin, immigrant status, or religion -- Eliot identified the "great diversity in the population of the United States as regards racial origins" as a critical element in America's heterogeneous society.

And so Harvard -- quite consciously -- began to open its doors to children of new immigrants, to members of religious minorities, and also (although in small numbers) to African Americans. One of those black students, W.E.B. Du Bois, class of 1890, would later affirm the significance of Eliot's broad vision. Harvard, Du Bois wrote, "was no longer simply a place where rich and learned New England gave the accolade to the social elite. It had broken its shell and reached out to the West and to the South, to yellow students and to black. ... [Eliot and others] sought to make Harvard an expression of the United States."

Eliot realized that diversity can cause turbulence in the life of a university and make the experience of being a student more difficult and, at times, even alienating. But he insisted on the importance of a more open, diverse, and even disputatious university, where the "collision of views" would promote "thought on great themes," teach "candor" and "moral courage," and cultivate "forbearance and mutual respect." He saw that an inclusive vision of higher education not only would benefit individual students, but also would serve the needs of a society strongly reliant on a wide variety of citizens who would have to learn to live together if the nation’s democratic institutions were to function effectively and if its ideals were to be realized.
The goals that Charles Eliot and other educators tried to achieve a century ago may strike many people as irrelevant to our present circumstances, because so much has changed since the early 20th century. Harvard, like many other universities, has become far more diverse. The path has been one of genuine, if slow and imperfect, progress -- not without hesitation and serious lapses, not without tension and divisiveness and struggle, and not without challenges still to be met.

But the essential principles defined by Eliot and others are no less important now than they were a century ago. We must reaffirm the critical role that students with different backgrounds, perspectives, and experiences play in educating one another. We need to insist upon the essential part that colleges and universities play in creating opportunities for students to live in association with peers who are, in many respects, different from themselves but who also have much in common. The process is not always smooth, but its complexity only highlights its importance.

This perspective has long been integral to Harvard's approach to admissions, and to those of many other colleges and universities. We select students not only on the basis of what they have already achieved academically, but also on strong evidence of their future promise, including their capacity to contribute to the larger society; on their character, curiosity, and determination; on their willingness to engage in discussion and debate, and to entertain the idea that tolerance and mutual respect are worthy goals. We assess individuals as individuals, looking not only at important yet imperfect measures such as grades and test scores, but also at a wide range of factors including particular talents, experiences, interests, and backgrounds.

In choosing from among a pool of qualified candidates larger than the number of available places, we also consciously consider the "mix" of the class as a whole, because we recognize how much our students' variety -- along many dimensions --contributes to their education. Indeed, Justice Lewis F. Powell, in his pivotal opinion in the Supreme Court's 1978 Regents of the University of California v. Bakke case, recognized that universities have a compelling interest in the educational benefits of a diverse student body.

In the recent Hopwood case, however, two members of the three-judge appeals court rejected Justice Powell's reasoning, as well as the decision of a majority of the Supreme Court in Bakke that race may be considered as one factor among many in university admissions. The Hopwood opinion asserts that the consideration of race as a factor in the admissions process "simply achieves a student body that looks different" and thus "is no more rational on its own terms" than considering "the physical size or blood type of applicants." I respectfully and strongly disagree.
Clearly, no racial or ethnic group is monolithic, and few would suggest that race or ethnicity alone is responsible for defining an individual's experiences and point of view. Nonetheless, race historically has been, and still remains, a powerful distinguishing feature in our society. For instance, we can speak meaningfully of African-American cultural traditions and communities -- while fully acknowledging their disparate elements -- in ways that we could not do if we focused upon a group of men and women whose common feature was O-negative blood.

Our current situation is the product of centuries of history; circumstances may well change in the future, but they are unlikely to do so quickly or without conscious and sustained effort. Race remains a factor that significantly influences the process of growing up and living in the United States -- one that clearly plays a role in shaping the outlooks and experiences of millions of Americans.

To say that factors such as race and ethnicity may be taken into account in the admissions process certainly does not mean that they should be elevated above all others. It does not imply efforts to achieve specific numerical targets through quotas. It means that an applicant’s race or ethnicity may be considered as one factor among the many considerations that go into assessing each applicant as a genuine individual -- as someone whose "merit" cannot be measured purely in terms of numbers; as someone who has the potential to contribute something distinctive and important to the enterprise of learning and to society.

We should not romanticize diversity as we assess its value. We know that close association among people from different backgrounds can lead to episodes of tension, and that common understandings often emerge only slowly and with considerable effort, if at all. Yet we need to remember that the character of American society, from its very beginnings, has been shaped by our collective willingness to carry forward an unprecedented experiment in diversity, the benefits of which have seldom come without friction and strain.

Without overstating our successes, we should recognize that the steady efforts to diversify our colleges and universities have brought about the most inclusive system of higher education ever achieved. American education has grown stronger as a result, and so have the prospects for our heterogeneous democracy. Whatever problems we face as a society, it is difficult to imagine that they would not be far more severe, divisive, and profound if the nation had not made a sustained commitment to opening the doors of higher education to people of all backgrounds, including people from different racial and ethnic groups.

I do not believe that we can solve the persistent problems surrounding race and ethnicity in American life simply by stating that we live, or ought
to live, in a society where those characteristics have ceased to be significant. Our hope lies in finding effective ways to narrow -- and bridge -- the gaps that continue to exist among many people of different races and ethnic backgrounds. One of the most significant ways we have begun to achieve that goal is through education. To change course now would be to retreat from decades of steady hope and progress, to follow pathways far less bright and far less full of promise.

C. Pluralism

For discussion purposes, Brown University has defined "pluralism" as:

a 'state of affairs in which several distinct ethnic, religious and racial communities live side by side, willing to affirm each other's dignity, ready to benefit from each other's experience, and quick to acknowledge each other's contributions to the common welfare.'

D. Community

The American Heritage Dictionary describes "community' as a group of people having common interests; a group viewed as forming a distinct segment of society; similarity or identity. Brown has, however, used the term "community" to define an ideal in which each individual takes ownership in, gains from, and contributes to Brown, whether as a student, a faculty member, an administrator, a staff member, an alumnus/a, or a member of the governing board. A community in which pluralism and diversity are embraced is one in which every individual who is part of Brown feels free to comfortably identify with his or her own racial, ethnic, sexual-preference, or other identity group, knowing that he or she will still be recognized and affirmed by other in the Brown community. It is also a community in which each individual feels a commitment to the shared goals of academic excellence, educational service, and public-spirited leadership.

III. Religion

*Rosenberger et al. v Rector and Visitors of the University of Virginia et al., 513 US 959 (1995)*

In yet another 5-4 vote, a majority of the Supreme Court held that the University of Virginia's refusal to provide funds (from a mandatory student activity fee used to subsidize a variety of student activities) to a religiously constituted student group violated the First Amendment rights and Free-Speech Rights of the students. The Court also held that funding of the particular organization would not violate the First Amendment's prohibition against the "establishment of religion. Although the discussion focused on whether the University's position represented viewpoint discrimination (the majority view) as opposed to subject matter distinction (the minority view), the several excerpts from the opinion may offer some perspective on access as well as religion and its place in a diverse institution:
As we have noted, discrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination. See, e.g., R.A.V., supra, at 391. And, it must be acknowledged the distinction is not a precise one. It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought. The nature of our origins and destiny and their dependence upon the existence of a divine being have been subjects of philosophic inquiry throughout human history. We conclude, sophic nonetheless, that here, as in *Lamb's Chapel*, viewpoint discrimination is the proper way to interpret the University's objections to Wide Awake. By the very terms of the SAF prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint, from which a variety of subjects may be discussed and considered.

Vital First Amendment speech principles are at stake here. The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. See *Healy v. James*, 408 U.S. 169, 180-181 (1972); *Keyishian v. Board of Regents, State University of N.Y.*, 385 U.S. 589, 603 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). In ancient Athens, and as Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, universities began as voluntary and spontaneous assemblages or concourses for students to speak and to writ and to learn. See generally R. Palmer & J. Colton, *A History of the Modern World* 39 (7th ed. 1992). The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the nation's intellectual life, its college and university campuses.

Justice Kennedy for the Majority

At the conclusion of a lengthily dissent, in which he distinguishes *Widmar v. Vincent* 454 U.S. 263 (1981) and *Lamb's Chapel* regarding entitlement to access for speaking purposes, Justice Souter offers the following warning which might well describe the situation colleges and universities face today:
Since I cannot see the future I cannot tell whether today's decision portends much more than making a shambles out of student activity fees in public colleges. Still, my apprehension is whetted by Chief Justice Burger's warning in *Lemon v. Kurtzman*, 403 U.S. 602, 624 (1971); "in constitutional adjudication some steps, which when taken were thought to approach 'the verge,' have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a 'downhill thrust' easily set in motion but difficult to retard or stop."